

1957

July 31

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Mr. Roy E. Batchelder, Secretary
Department of Agriculture
Division of Milk Control
Concord, New Hampshire

OCT 01 1998

CONCORD, N.H.

Dear Mr. Batchelder:

This is in reference to the question raised in your letter of July 25, 1957, concerning the application of the Associated Grocers of New Hampshire, Inc., for a distributor's license under RSA 133, and to a related question discussed at our meeting of July 29, attended by Maurice G. Chase, Chairman of your board and Assistant Attorney General Arthur H. Bean, Jr. (1)

In its application for a distributor's license Associated Grocers indicated that it proposes to purchase milk from one or more processors in the Manchester area and that the processor will package the milk in cartons provided by the corporation. Distribution will be made by the processor directly to the member stores on contract with the processor. Associated Grocers will be billed F.O.B. processor's plant.

RSA 133:2 defines a distributor as follows:

"Distributor," means any person who produces and sells, who purchases for sale or sells, or who receives on consignment for sale, more than two quarts of milk daily within the state for consumption, disposition or use within the state, except those who sell milk for consumption on the premises. A producer who delivers or sells milk to a distributor only shall not be deemed a distributor."

Your question relates to whether transfers of milk from Associated Grocers of New Hampshire, Inc., to its member stores can be found to constitute sales within the meaning of this section.

C O P Y

Mr. Roy E. Watchelder, Secretary

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Associated Grocers of New Hampshire, Inc., is a business corporation organized on November 9, 1935, under the name of New Hampshire Wholesale Grocers, Inc. On April 18, 1949, the name was changed to Associated Grocers of New Hampshire, Inc. The corporate purposes are:

"to engage in the business of a cooperative in the purchasing, warehousing, sale and delivery at net cost to its stockholders, groceries and all other kinds of property now or hereafter sold by retail grocers, to sell and to deliver to nonstockholding wholesale and retail grocers, groceries and all other kinds of property now or hereafter sold by retail grocers in such amounts and at such prices as may best serve the interests of the members, and to do all things incidental and necessary to carry out such cooperative purposes for the benefit of the member stockholders of the corporation."

In determining whether a corporation should be recognized as a being independent of those associated as its stockholders it is important to ascertain whether the corporate device is being used to avoid a clear legislative purpose. New Hampshire Wholesale Grocers Association v. Liquor Commission, 100 N.H. 5. No such use is seen here. On the contrary it appears from our discussion of this case, and on examination of the charter, that the member stores are independently operated and not subject to control by the corporation.

We are of the opinion that the transactions in question constitute sales and that Associated Grocers, Inc., is entitled to a distributor's license.

In the course of our discussion you also referred to a situation where a distributor's license had been issued to an individual where it appears that the only sales made by the distributor were to restaurants which he operated. The milk was then resold to customers of the restaurant. The latter type sale is excluded under the definition of distributor in RSA 103:2, as a sale "for consumption on the premises." If in fact the distributor and the restaurant represent the same ownership a serious question would exist as to whether a distributor's license should have been issued. We will be glad to discuss this matter with you further after you have investigated the respective ownerships involved. (2)

Very truly yours,

Elmer T. Bourque
Assistant Attorney General

ETB/lt